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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

RICHARD T. GOSSER, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Richard T. Gosser, respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed his conviction on an indictment charging conspiracy to defraud the United States in violation of 18 U.S.C. § 371.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 339 F. 2d 102; it is set forth in Appendix A to this petition (pp. 1a-19a, infra). There was no reported or other formal opinion in the District Court.

JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1254(1) and on this Court's Rule 22(2). The Court of Appeals rendered its opinion and judgment December 8, 1964 (R.).[1] Petitioner filed a timely petition for rehearing (R.), which the Court of Appeals denied on March 24, 1965 (R.). On April 6, 1965, Mr. Justice Stewart entered an order extending to and including May 23, 1965, the time to file a petition for certiorari.

QUESTIONS PRESENTED

1. Whether the Court of Appeals falls short of affording the requisite appellate review when it affirms the trial judge's Jencks Act ruling without ever itself making an appellate examination, *in camera* or otherwise, of the documents which the trial judge had ruled were not Jencks Act "statements" and hence could be withheld from the defense.

2. Whether by totally withdrawing the entrapment issue from the jury the trial judge invaded the jury's province and departed from acceptable standards governing submission of issues of fact to the jury; and whether the fair scope of the Sixth Amendment's guaranty of trial by jury applies to the entrapment

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[1] The clerk of the Court of Appeals has certified a record consisting of (1) the Appellants' Appendix printed for the Court of Appeals, which is referred to herein as "Appellants' App."; (2) the printed Appellee's Appendix, which is referred to herein as "Appellee's App."; (3) the Court of Appeals proceedings, the pages of which are unnumbered and which are referred to herein as "R"; and, by way of supplemental certification, (4) the Court of Appeals docket entries.

Pursuant to this Court's Rule 21(3) and (4), nine additional copies of the Appellants' Appendix and the Appellee's Appendix are being filed in this Court. Occasional references to the typewritten transcript of the trial are indicated herein by "Tr.".

issue as raised in this case, particularly in light of the circumstance that the entrapment issue turns largely on the credibility of witnesses whose credibility was also required to be weighed by the jury in determining guilt or innocence.

3. Whether in cross-examining a reputation witness the prosecutor may properly bring before the jury remote and prejudicial circumstances and events, including otherwise inadmissible arrests and convictions of the defendant, some of which had occurred more than forty years earlier, and including an insinuation that the defendant associated with a person who is a convicted felon and a gambler; and if *Michelson* v. *United States,* 335 U.S. 469, is deemed to permit such prejudicial cross-examination as occurred in this case, then whether *Michelson* should be limited, modified or overruled.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The pertinent constitutional, statutory and rules provisions are set forth in Appendix B to this petition (pp. 20a-22a, infra). They are, respectively, the Due Process Clause of the Fifth Amendment; the Trial by Jury Clause of the Sixth Amendment; the Jencks Act, 18 U.S.C. § 3500; and Rule 26 of the Federal Rules of Criminal Procedure, relating to the rules of evidence in criminal cases in the federal courts.

STATEMENT OF THE CASE

This is a federal criminal case on direct review. Petitioner Gosser, together with co-defendants Pinciotti and Maison, was indicted and was convicted by a jury in the United States District Court for the Northern District of Ohio, Western Division, for conspiracy

to defraud the United States in violation of 18 U.S.C. § 371. The indictment alleged that the conspiracy began on or about October 5, 1962, and continued up to and including November 12, 1962 (Appellants' App. 3a-7a).

Mrs. Patricia R. Niedomski was a Government employee with access to confidential files of the Intelligence Division of Internal Revenue Service. The indictment named her as a co-conspirator but not as a co-defendant, and she testified as one of the principal prosecution witnesses at the trial. The substance of the offense alleged was that the three defendants (petitioner Gosser and co-defendants Pinciotti and Maison), together with Mrs. Niedomski, conspired that Mrs. Niedomski would make available to the defendants certain documents and transcriptions thereof, surreptitiously taken by Mrs. Niedomski from the files of Internal Revenue Service, pertaining to the Government's investigation of petitioner Gosser's income tax returns. The indictment alleged that they thereby conspired to defraud the United States in its exercise of its governmental function and right of administering the Internal Revenue Service free from unlawful impairment and obstruction and free from corruption, improper influence, dishonesty and fraud.

Much of the evidence is summarized in the Court of Appeals' opinion (Appendix A, infra), to which reference is made.

At the trial the case was sharply contested. Towards the end of the trial, petitioner Gosser testified in his own defense (Appellants' App. 184a-187a; Appellee's App. 70b-85b); he denied any knowledge of or participation in the conspiracy alleged, and he testified that he had never asked anybody, directly or indirectly, to

get any documents or information for him from Government files. Certain events and rulings, which are the basis for the review being sought in this Court, will be described with more particularity. After the jury convicted all three defendants, petitioner filed a motion for new trial which was denied (Appellee's App. 93b); and the judge sentenced petitioner to three years imprisonment (Appellants' App. 248a-249a). That judgment has now been affirmed by the Court of Appeals for the Sixth Circuit (Appendix A).

Certiorari is being sought to review three groups of occurrences—(1) the Court of Appeals' denial of proper appellate review of the Jencks Act question; (2) the invasion of the jury's province by the total withdrawal of the entrapment issue from the jury; and (3) the prosecution's prejudicial and unfair cross-examination of petitioner's reputation witness. The facts pertaining to these matters may be summarized as follows:

Facts Relating to Denial of Proper Appellate Review of Jencks Act Question. Mrs. Niedomski was one of the prosecution's principal witnesses at the trial.[2] After she had completed her direct testimony, petitioner's trial counsel made a Jencks Act demand for all her statements, including any notes, memoranda or interview reports by lawyers or agents incorporating statements she made to them (Appellants' App. 37a-40a). The prosecutor did turn over to the defense various statements of the witness. But the prosecutor resisted turning over certain other documents, claiming that

[2] In the typewritten transcript of the trial, her testimony begins at Tr. 311 and ends at Tr. 490. Substantial excerpts from it are set forth at Appellants' App. 31a-74a, and additional excerpts at Appellee's App. 1b-16b.

they were his "witness sheets made in preparation for trial" or "Government attorney's notes, of what I expected the witness to testify to," and that under the Jencks Act they were not required to be shown to the defense (Appellants' App. 40a-42a). These so-called "witness sheets" the prosecutor produced for the trial judge (Appellants' App. 42a). The trial judge asked the prosecutor several questions about them and after looking them over the trial judge stated "I conclude from what I see here that you would not be entitled to it. It is his work sheet in preparation for trial. It is what he had dictated to his stenographer in preparing for the trial here" (Appellants' App. 42a-43a). Petitioner's trial counsel then moved that the witness' testimony be stricken, but the trial judge adhered to his ruling that under the Jencks Act these were not documents which needed to be furnished to the defense (Appellants' App. 43a-44a). In affirming, the Court of Appeals stated that the trial judge had followed the proper procedure to determine whether the "witness sheets" were required to be produced under the Jencks Act and that the trial judge's finding "is not clearly erroneous and must be accepted on this review" (pp. 18a-19a, *infra*). But in making this appellate determination, the Court of Appeals did not have before it, and never itself examined either *in camera* or otherwise, the so-called "witness sheets" themselves.[3] In

[3] This is the only reasonable conclusion which could be drawn from the face of the Court of Appeals opinion. Counsel nevertheless sought further confirmation in connection with obtaining from the clerk of the Court of Appeals, for filing in this Court, a certified copy of the docket entries in the Court of Appeals (see note 1 on p. 2, supra). The further confirmation will be found in the fact that the Court of Appeals docket entries likewise make no reference to the "witness sheets" ever being requested by or being made available to the Court of Appeals for *in camera* ex-

other words, the documents withheld from the defense were not made available to the Court of Appeals either by the trial court or by the Government, nor were they requested by the Court of Appeals. The Court of Appeals sustained the trial judge's conclusion without itself ever looking at the actual contents of the withheld documents.

Facts Relating to Improper Withdrawal of Entrapment Issue from the Jury. The essential facts bearing on the entrapment issue are summarized in the Court of Appeals' opinion (pp. 2a-7a, infra). Petitioner Gosser was the senior vice president of the United Automobile Workers of America; the defendant Pinciotti was an administrative assistant to Gosser; the defendant Maison was in the numbers business and was married to Mrs. Niedomski's cousin. Prosecution witnesses testified that beginning on October 19, 1962, Mrs. Niedomski had been observed in the Toledo Treasury Intelligence Office, typing from reports which were not in her area of responsibility; that from October 22 through November 1, Mrs. Niedomski was under surveillance by various government agents; that on November 2 she was questioned by three agents and accused of giving information from the files of the Intelligence Division to the defendant Maison; that she then admitted this, and showed agents notebooks and other documents at her home relating to a Treasury intelligence investigation into petitioner Gosser's tax affairs. According to Mrs. Niedomski's testimony,

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amination. Moreover, by letter dated April 29, 1965, transmitting these docket entries, the clerk of the Court of Appeals has informed petitioner's counsel as follows: "As you will note, the docket entries make no mention of the so-called 'Witness Sheets' and I have no recollection of any such sheets having been transmitted to this court."

she had furnished to Maison information on certain non-Gosser tax matters prior to October 1962, and she began furnishing to Maison certain information on the Gosser tax investigation pursuant to a request Maison had first made to her on October 5—an occasion when, she claimed, Maison had talked to her about Gosser and Pinciotti and had said that Gosser would be interested to know who the informant was on information relating to the Gosser case. There was no evidence that Mrs. Niedomski knew either Gosser or Pinciotti, and she admitted that Maison was the only one of the defendants she had ever talked to and that she did not know what was happening to the documents she gave him except for what Maison said to her (Appellants' App. 54a). On cross-examination, she reiterated her claim that it was November 2, not earlier, when she first became aware that Government agents had knowledge of her activities (Tr. 327-328, 403-404; Appellants' App. 55a).

After November 2, according to the testimony of Mrs. Niedomski and other prosecution witnesses, Mrs. Niedomski cooperated with Government agents in the execution of a most elaborate and detailed plan, meticulously worked out by the Government agents, whereby she made an arrangement to meet Maison again on November 9, and she delivered to Maison on November 9 certain Government documents relating to the Gosser tax investigation. As the Court of Appeals opinion shows, these documents had been carefully selected, dusted with fluorescent material, and placed in envelope and in Mrs. Niedomski's custody—all by Government agents. The prosecution presented evidence from which the jury might have concluded that these documents had been delivered in turn by Maison to Pinciotti on the morning of November 12. Later on November 12 the same documents were found by

Government agents in the drawer of a desk located in an office at the United Automobile Workers' Health and Retiree Center in Toledo. This was the building in which Gosser and Pinciotti maintained their offices; and Gosser and Pinciotti, together with one Scott, were in that office at the time federal agents entered to arrest Pinciotti and to make a search of the room. Petitioner Gosser testified he had no knowledge that the documents were there.

The entrapment issue was vigorously pressed before the trial judge at various stages of the case. Thus, at the close of the prosecution's case the petitioner's counsel argued at length—as did counsel for the other defendants (Tr. 1106-1118; 1121)—that the court should find as a matter of law that entrapment had occurred, but that if the court did not so find, then the entrapment issue must be submitted to the jury (Tr. 1084-1099). At the close of the trial, various defendants' requests were made that the jury be charged on the issue of entrapment (Appellants' App. 205a-206a, 208a-209a); these were refused by the judge, and exceptions taken on behalf of all the defendants (Id. 191a-192a). The prosecutor, on the other hand, expressly requested that the judge charge as follows (Id. 210a):

> "There has been reference in this case to what is generally termed in the law as 'entrapment'. I charge you as a matter of law that the facts of this case do not raise any issue of entrapment and therefore you are not to consider it in your deliberations."

Acting upon this request by the prosecution and using this identical language in his charge, the trial judge totally withdrew the entrapment issue from the jury (Id. 200a). The Court of Appeals in sustaining the trial judge, held that "the undisputed facts establish, without question, that entrapment did not exist in the

present case" (p. 10a, infra). It ruled that "the evidence showed without contradiction that Maison and Mrs. Niedomski were engaged in a conspiracy to obtain illegally copies of confidential documents . . . long before the government agents knew about it or entered the case" (p. 10a, infra), and that this was enough to establish that the trial judge had committed no error "in ruling as a matter of law that the defense of entrapment was not an issue in this case" (p. 12a, infra).

Facts Relating to Unfair Cross-Examination of Reputation Witness. Before the petitioner Gosser had testified, and before he had made any election as to whether he would testify, his trial counsel called as a reputation witness Monsignor Michael J. Doyle, a Catholic priest and the Director of Catholic Charities in the Toledo area. Msgr. Doyle testified he had known Gosser about 18 years, had served with Gosser on the Labor-Management Citizens Committee, and that Gosser's reputation for honesty and integrity is very good (Appellants' App. 170a-171a). The prosecutor, over vigorous objection, was then allowed by way of cross-examination to put to Msgr. Doyle the following twelve questions and to elicit answers with respect to them: (1) whether, in discussing Gosser's reputation, "you ever discussed the fact of his association with one Neufio Scott, who is a convicted felon and gambler"; (2) "have you heard that Mr. Gosser had been convicted, or rather pled guilty to a charge of robbery on the Dixie Highway in 1921", "as a result of which he was sentenced to two and a half to fifteen years at the Michigan State Reformatory";[4] (3) have you discussed "whether or not Mr. Gosser was arrested in Toledo in

[4] When, at a subsequent point in the trial, petitioner Gosser elected to testify in his own defense, the prosecutor of course elicited information concerning the details of this felony conviction (Appellee's App. 72b).

July, 1920, on a charge of 'suspicion, auto theft' "; (4) "have you heard that Mr. Gosser in August of 1920 was arrested in Toledo on charges of 'suspicious person' and on the 18th of August was sentenced to thirty days and costs, and the sentence suspended"; (5) had he discussed "whether or not Mr. Gosser was arrested as a Richard McMullin by the police department in Toledo in March of 1921 on a charge of 'fugitive from justice' "; had he discussed (6) whether or not Gosser "had been indicted for receiving and concealing stolen property in March of 1921" or (7) whether or not Gosser "had been arrested in November of 1939, as a disorderly person", or (8) "whether or not Mr. Gosser ever appeared before the McClelland Committee in Washington and was examined as to certain alleged union fund activities"; (9) "have you ever heard, Msgr., that there is a numbers gambling activity in Toledo, or rather in the Willys plant in Toledo"; (10) "have you heard, Msgr., as to Mr. Gosser's financial transactions in connection with certain properties in Michigan and properties that were later sold to the union"; (11) "have you ever discussed, Monsignor, with the people with whom you have discussed Mr. Gosser's reputation, whether or not slot machines and gambling devices were used in union places where the union had offices during the period of time that Mr. Gosser was the union president or regional director or some such union office"; and, finally, (12) "have you heard, Monsignor, from the people with whom you have discussed Mr. Gosser's reputation, whether or not Mr. Gosser associates with gambling figures in the City of Toledo" (Appellants' App. 172a-183a).

This entire line of prejudicial cross-examination was strenuously objected to by petitioner's trial counsel; but the trial judge, essentially on the basis of this Court's decision in *Michelson* v. *United States,* 335

U.S. 469, ruled that the prosecutor's line of cross-examination might proceed (Appellants' App. 172a-179a). The judge gave the usual instruction to the jury that such questions and answers were to be considered "solely as going to the credibility of the witness on the stand," and "only for this witness as probing his knowledge of the reputation of Gosser" (Appellants' App. 178a, 179a, 180a, 183a) and later this was repeated in the judge's charge to the jury (Appellants' App. 202a). After the cross-examination was completed, petitioner's counsel renewed his objection by a further motion for mistrial, which the trial judge overruled (Appellants' App. 184a). In affirming on this point, the Court of Appeals, like the trial judge, relied on this Court's decision in *Michelson* (p. 16a, infra).

REASONS FOR GRANTING THE WRIT

I. With Respect to the Court of Appeals' Failure to Give Proper Appellate Review to Jencks Act Question

The Court of Appeals has totally frustrated the appellate review process contemplated under the Jencks Act.

The Court of Appeals purported to review the trial judge's ruling that the prosecutor's so-called "witness sheets" were not Jencks Act "statements" required to be turned over to the defense.[5] But as already shown

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[5] As this Court has stated, "It is settled, of course, that a written statement, to be producible under § 3500(e)(1), need not be signed by the witness, . . . or written by him, . . . or be a substantially verbatim recording of a prior oral statement . . ." *Campbell* v. *United States*, 373 U.S. 487, 492 note 6. Even where, as here, the documents in question are notes made or dictated by the prosecutor, what determines their producibility under the Jencks Act is their actual content and the faithfulness of that content in reflecting statements made by the witness. *Saunders* v. *United States*, 316 F. 2d 346, 348-351 (D.C. Cir.); *United States* v. *Aviles*, 337 F. 2d 552, 557-559 (2d Cir.), cert. denied, 380 U.S. 906.

(pp. 5-7, supra), this appellate review was basically defective: the Court of Appeals sustained the trial judge without itself making an appellate examination, *in camera* or otherwise, of the "witness sheet" documents and without even having the contents of such documents available to it for appellate examination.

In thus denying to petitioner the full appellate review to which he is clearly entitled, the Sixth Circuit has flagrantly departed from the procedures this Court has approved for appellate review under the Jencks Act. Moreover, the Sixth Circuit's procedure here is in irreconcilable conflict with the procedures followed by the Courts of Appeals in the other circuits throughout the country. The Sixth Circuit's procedure likewise is inconsistent with the Due Process Clause. Corrective action by this Court is called for.

It is a matter of substantial importance to the administration of justice that appellants in the Sixth Circuit not be deprived of a full appellate review of Jencks Act questions. Recognizing the necessity and importance of assuring a full appellate review, the Jencks Act itself (set forth at pp. 20a-22a, infra) expressly provides, 18 U.S.C. § 3500(c), that when portions of a statement are withheld from the defense, then "the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge." Surely the same procedure must be equally contemplated and equally required when, as here, the documents are withheld not merely in part but in their entirety.

A defendant, being cut off from access to the document, at best is badly handicapped in making his argument on appeal that the contents of the document bring it within the Jencks Act criteria. Necessarily, the fairness of the procedure must depend on the reality of the process of *in camera* appellate scrutiny of the document's contents; and there is a corresponding obligation on the courts and the Government to make sure that this process is not short-circuited or, as here, bypassed entirely. A Court of Appeals which does not take the trouble to examine the withheld document—or indeed even to assure that the document be made available to it for examination—has deprived the defendant of his only real safeguard against an arbitrary or erroneous ruling of the trial judge.

The decisions in *Palermo* v. *United States,* 360 U.S. 343, 355-356, and *Rosenberg* v. *United States,* 360 U.S. 367, 369-370, make it clear that this Court regards the appellate court's inspection of the withheld documents to be an indispensable part of the process of Jencks Act appellate review. Furthermore, in sustaining the Jencks Act's constitutionality, this Court underscored the point by stressing that whether a particular statement comes within the Jencks Act is a decision vested in the trial judge "with full opportunity for appellate review." *Scales* v. *United States,* 367 U.S. 203, 258.

In every other circuit where the matter has arisen, the Court of Appeals has been careful to afford proper review of the Jencks Act question by actually examining *in camera* (or, occasionally, disclosing the contents of) whatever documents the trial judge had ruled could be withheld from the defendant. Illustrative decisions

are cited in the footnote.[6] They show that this is the uniform procedure in the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and District of Columbia

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[6] First Circuit: *Harney* v. *United States*, 306 F. 2d 523, 532 533, cert. denied, 371 U.S. 911 ("examination of the exhibit clearly shows that it is not a 'statement' "); see also *Campbell* v. *United States*, 365 U.S. 85, 90 note 3.

Second Circuit: *United States* v. *Cardillo*, 316 F. 2d 606, 615-616 ("We have examined these statements and find that the defense was not entitled to their production"; the trial court's conclusion "is supported by our own independent examination of the same documents"); *United States* v. *Sten*, 342 F. 2d 491, 493-494.

Third Circuit: *United States* v. *Allegrucci*, 299 F. 2d 811, 814, cert. denied, 372 U.S. 954; see also *United States* v. *McCarthy*, 301 F. 2d 796, 801.

Fourth Circuit: *United States* v. *White*, 342 F. 2d 379, 382 ("We also have examined the contents of the file which was before the court below").

Fifth Circuit: *Papworth* v. *United States*, 256 F. 2d 125, 130, cert. denied, 358 U.S. 854.

Seventh Circuit: *United States* v. *Spatuzza*, 331 F. 2d 214, 218 ("We have examined both the report and the notes . . .").

Eighth Circuit: *Hance* v. *United States*, 299 F. 2d 389, 393 ("all such documents have been lodged with this Court and we have examined the same for the purpose of determining the correctness of the ruling made by the trial judge").

Ninth Circuit: *Barnard* v. *United States*, No. 17,746, decided February 3, 1965, slip opinion, p. 17: ("We have examined the first statement and the portions of the other two statements that the court sealed . . .").

Tenth Circuit: Compare *Travis* v. *United States*, 269 F. 2d 928, 944-945 (only re excised portions), reversed on other grounds, 364 U.S. 631.

District of Columbia Circuit: *Williams* v. *United States*, 328 F. 2d 178, 180 ("In the present case the trial judge examined the statements. They have also been made available to and have been examined by this court.").

Circuits, and probably in the Tenth Circuit as well.[7] In other words, what the Sixth Circuit has done in the present case not only is seriously in error; it is fundamentally at odds with the procedures followed everywhere else. This Court should grant certiorari to correct it.

II. With Respect to the Total Withdrawal of the Entrapment Issue from the Jury

This case presents serious and important questions concerning the applicable standards which should govern the division of functions between judge and jury on the issue of entrapment. The problem is one which often recurs in the lower federal courts. Recently its complexities have been several times adverted to, but not resolved, by this Court in *Sherman* v. *United States,* 356 U.S. 369, 376-378; *Masciale* v. *United States,* 356 U.S. 386, 388 note 5; and *Lopez* v. *United States,* 373 U.S. 427, 436. It involves fundamental questions of policy in the administration of the criminal law. It also involves the scope of the right to trial by jury as guaranteed by the Sixth Amendment, both in its historical context and in the light of present-day conditions.

The present case presents an appropriate vehicle for the consideration of such matters by this Court, and the Sixth Circuit's ruling underscores the need for such a review to be made. It is true that there have been

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[7] The only decision found in the Tenth Circuit, *Travis* v. *United States,* cited in note 6, supra, relates to a situation where portions of statements were excised. The Court of Appeals there made its own *in camera* examination of the excised portions (269 F. 2d at 944), and the opinion gives every ground for believing that that Court would do the same with respect to a document withheld in its entirety.

concurring opinions of some of the justices of this Court which indicated a view that the issue of entrapment should be determined by the trial judge rather than by the jury. See the concurring opinion of Mr. Justice Roberts in *Sorrells* v. *United States,* 287 U.S. 435, 453, and the concurring opinion of Mr. Justice Frankfurter in *Sherman* v. *United States,* supra, 356 U.S. at 379. Such a position has never commanded the support of a majority of this Court, and the present case illustrates the strong reasons why, particularly in the light of the Sixth Amendment's guaranty of trial by jury, it should not prevail.

But the expression of such a view in the *Sherman* concurring opinion—together with intimations in the Court's majority opinion in *Sherman,* supra, 356 U.S. at 376-378, that the matter might possibly be open for reassessment on fuller argument — inevitably have tended to encourage some of the lower federal courts to take a very narrow view of the scope of the jury's function in determining an entrapment issue. The Sixth Circuit's handling of the entrapment issue in the present case shows how far that process of erosion of the constitutional right to trial by jury can be carried, unless checked by this Court.

The Sixth Circuit's decision pays lip-service to the principle that, in appropriate instances, the determination on entrapment must be submitted to the jury.[8] But

[8] The Sixth Circuit here correctly assumed that the defense of entrapment is not foreclosed to a defendant who denies having participated in the alleged offense. In two circuits, it is true, the decisions indicate that such defenses have an "inconsistency" which will not be permitted. *Sylvia* v. *United States,* 312 F. 2d 145, 146 (1st Cir.); *Dunbar* v. *United States,* 342 F. 2d 979, 982 (9th Cir.). But the better reasoned decisions are to the contrary and allow both defenses to be made, regardless of whether the

having said this, the Sixth Circuit then proceeded to apply a standard whereby the court, rather than the jury, would finally determine all matters of credibility of witnesses bearing on the disposition of the entrapment issue, and whereby the court, rather than the jury, would make the definitive assessment of the entire facts and circumstances to determine whether entrapment had occurred. Yet it was clearly the jury, and not the trial judge, in whom such final determination should have resided, unless there is to be a total disregard of the doctrine set forth by this Court in *Sherman,* supra, 356 U.S. at 372, that entrapment occurs "when the criminal conduct was 'the product of the creative activity' of law-enforcement officials", and that the problem is to draw a line "between the trap for the unwary innocent and the trap for the unwary criminal." Indeed, in the very next paragraph of its opinion in *Sherman,* 356 U.S. at 372, this Court indicated that it is not the function of a court to determine "as a matter of law" that entrapment is or is not established except in situations where it is clear that the determination does not depend on "choosing between conflicting witness, nor judging credibility".

In the present case questions of credibility were indeed at the core of the entrapment issue. This appears clearly from a consideration of several of the alternatives which might have been open to the jury to determine, if the trial judge had not totally withdrawn the entrapment issue from them. One possibil-

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defenses are considered to be inconsistent or merely alternative. *Hansford* v. *United States,* 303 F. 2d 219, 221 (D.C. Cir.); *Henderson* v. *United States,* 237 F. 2d 169, 171-173 (5th Cir.); *Sears* v. *United States,* No. 21555, decided March 18, 1965 (5th Cir.); *United States* v. *Becker,* 62 F. 2d 1007 (2d Cir.); see Note, "Entrapment", (1960) 73 Harvard L. Rev. 1333, 1343.

ity is that the jury might have concluded that petitioner Gosser did not have any knowledge of or any connection with the conspiracy until the events of November 12, 1962, just before the arrests were made.[9] If the jury had reached such a determination, then the evidence of the Government's deliberate entrapment of petitioner Gosser, by conceiving an elaborate and tempting plan designed to bring these documents to his attention and literally within his reach, would have been clear and convincing.

A second possibility is that the jury might have rejected the portion of the testimony of Mrs. Niedomski and other prosecution witnesses concerning the November 2 date when the cooperation between her and the Government agents began. The fact that these prosecution witnesses were in agreement as to this date did not mean that the jury was obliged to accept this portion of their testimony. Instead, the jury might have determined that Mrs. Niedomski and the Government agents had begun their cooperation much earlier—before the beginning of any conspiracy at all relating to the Gosser tax files. If the jury had reached such a determination, then the evidence would have been clear and convincing of a deliberate entrapment by Government agents to beguile the defendants into

[9] While the jury did not accept petitioner Gosser's testimony that he was innocent and had no knowledge of any conspiracy, this fact would not be in any way inconsistent with the jury's reaching a determination that he had been drawn into the conspiracy at virtually the last minute and directly in response to a detailed plan of entrapment conceived and carried out by and at the direction of Government agents. "Had there been an instruction properly adapted to the issues as framed, the jury might still have rejected the defense [of entrapment] . . . but in our view the evidence presented a jury question." *Smith* v. *United States*, 331 F. 2d 784, 792 (D.C. Cir.).

committing a crime which otherwise might never have been attempted or even conceived.

A third possibility is that the jury might have rejected the portions of Mrs. Niedomski's testimony concerning the Gosser tax investigation documents she claimed she had delivered to Maison before November 2 and concerning the statements she claimed Maison had made to her before November 2. If the jury had made such a determination, then again the evidence would have been clear and convincing that the offense, if there was one, originated with Government agents and that petitioner Gosser was entrapped.

Doubtless there were other alternatives as well. But these three—all of them totally withdrawn by the court from consideration by the jury—show how fundamentally the province of the jury has been invaded. They likewise show with what firmness the courts below have arrogated to themselves the function of determining issues of fact which the Sixth Amendment guarantees shall be tried by jury. Unless the trial judge is to be made the final arbiter of the credibility of the principal witnesses in the case, it was for the jury and not for the judge to resolve these matters.

It has been one of the historic roles of this Court to protect the right of trial by jury, preserving it against successive efforts at encroachment by the lower federal courts. This has been true both with respect to the Seventh Amendment's guaranty of jury trial in civil cases, e.g., *Webb* v. *Illinois C. R. Co.*, 352 U.S. 512; *Simler* v. *Conner*, 372 U.S. 221, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469; and with respect to the Sixth Amendment's guaranty of jury trial in criminal cases, e.g., *Davis* v. *United States*, 160 U.S. 469 (insanity

defense); *Grunewald* v. *United States*, 353 U.S. 391 (statute of limitations defense); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (military trials).

In some measure each entrapment case—like each negligence case under the Federal Employers Liability Act—may be said to depend on its own facts. But as the present case demonstrates, the application of erroneous standards manifests itself by serious invasion of the jury's function in particular cases. Recent decisions in some other circuits reflect a far broader and more accurate view of what must be left to the jury on an entrapment issue. E.g., *Gorin* v. *United States*, 313 F. 2d 641 (1st Cir.); *Whiting* v. *United States*, 321 F. 2d 72 (1st Cir.); *Sears* v. *United States*, No. 21555, decided March 18, 1965 (5th Cir.); *United States* v. *Georgiou*, 333 F. 2d 440 (7th Cir.); cert. denied, 379 U.S. 901; *Matysek* v. *United States*, 321 F. 2d 246 (9th Cir.); *Johnson* v. *United States*, 317 F. 2d 127 (D.C. Cir.); *Smith* v. *United States*, 331 F. 2d 784, 789-792 (D.C. Cir.). In principle the Sixth Circuit's decision here is in conflict with those decisions; it seems clear that if the present case had arisen in any of those circuits, the trial judge's total withdrawal of the entrapment issue from the jury would have been reversed. In any event, the Sixth Circuit's departure from the standards contemplated by the Sixth Amendment is sufficiently grave to call for an exercise of this Court's supervisory authority in order to set the matter right.

III. With Respect to Prejudicial Cross-Examination of Reputation Witnesses

In *Michelson* v. *United States;* 335 U.S. 469, this Court approved the principle of allowing to federal prosecutors wide latitude in the cross-examination of reputation witnesses called by the defense—a latitude permitting the prosecutor to ask the reputation witness whether the witness has heard about prior convictions of the defendant, prior arrests of the defendant, and even all kinds of prior damaging rumors which might conceivably have some bearing on the reputation of the defendant. Mr. Justice Rutledge, dissenting with Mr. Justice Murphy, expressed the view that, in the interests of fair play, the entire line of inquiry concerning specific incidents in the defendant's past should be foreclosed (335 U.S. at 496). Mr. Justice Jackson, writing for the Court, acknowledged that "much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other" (335 U.S. at 486). But, on balance, the Court thought it unwise then to adopt a new rule, "adhered to by the courts of only one state [Illinois] and rejected elsewhere", which would prohibit the prosecutor from asking the reputation witness whether, in considering the defendant's reputation, the witness had heard of a prior arrest of the defendant.

The apparent breadth of the Court's ruling in *Michelson* has given rise to some misgivings among the commentators. E.g., McCormick, Evidence (1954), pp. 336-337. But it has left federal prosecutors with a free hand to smuggle into the record and place before the jury all kinds of otherwise inadmissible facts and rumors which are designed to prejudice the defendant

severely in the eyes of the jury. Indeed, in the federal courts *Michelson* has established a situation which makes it almost prohibitively hazardous for a reputation witness to be called by any defendant who has ever been convicted or arrested or has even been the subject of damaging or hostile rumors.[10]

Although *Michelson* provided fresh support and encouragement to those state courts which had been following a comparably permissive rule,[11] there nevertheless are more recent signs that at least some of the state courts are moving in the direction of restoring the balance by placing greater restriction on the prosecutor's freedom in this area. Illinois, the one state whose decisions before *Michelson* aligned it clearly on the other side, has continued to adhere to the more restrictive view. *People* v. *Hermens*, 5 Ill. 2d 277, 286-287, 125 N.E. 2d 500, 505-506 (1955). California has now evolved a more restrictive rule by holding that the misconduct inquired of on cross-examination of the reputation witness must be inconsistent with the character traits attested to on direct, and by setting a rigorous standard as to what is required before a matter will be regarded as "inconsistent" for such purpose. *People* v.

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[10] About the only decision of a federal Court of Appeals which appears to have tried to limit, rather than extend, *Michelson* is *United States* v. *Phillips*, 217 F. 2d 435, 443-444 (7th Cir.), where the court was able to distinguish *Michelson* because the trial judge, contrary to the situation in *Michelson*, had taken no precautionary measures whatever and had utterly failed to inform the jury of the so-called limited purpose (namely, to test the witness' knowledge of the defendant's reputation) for which the questions were being asked.

[11] See the state court decisions collected in 3 Wigmore, Evidence (3d ed. 1940 and 1964 Supp.) § 988, and in Annotation, "Cross-Examination of Character Witness for Accused with Reference to Particular Acts or Crimes," (1956) 47 A.L.R. 1258-1331.

Tucker, 164 Cal. App. 2d 624, 331 P. 2d 160 (1958); *People* v. *Roberson,* 167 Cal. App. 2d 429, 334 P. 2d 666 (1959); *People* v. *Marsh,* 58 Cal. 2d 732, 744-746, 376 P. 2d 300, 308-309 (1962). Colorado, in a recent decision, *People* v. *Yoshio Futamata,* 140 Colo. 233, 236-237, 343 P. 2d 1058, 1059 (1959), has given its approval to what it called the "salutary criteria" set forth in a post-*Michelson* New Jersey decision, *State* v. *Steensen,* 35 N.J. Super. 103, 113 A. 2d 203 (1955)—namely, as the Colorado court put it, "the trial court should conduct a preliminary inquiry out of the presence of the jury so as to insure (a) that the alleged misconduct is actual; (b) that it is reasonably likely that it was the subject of rumor in the community; (c) that it is not too remote and that it was of the same character as the act on trial" (140 Colo. at 236, 343 P. 2d at 1060).

These wholesome developments point to the need for this Court to make a current review of the standards to be applied in the federal courts, in the light of the guidance furnished by Rule 26 of the Federal Rules of Criminal Procedure that rules of evidence shall be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience".

The present case is distinguishable from *Michelson* in a number of material respects. *Michelson* involved asking the reputation witnesses two questions—one as to a prior conviction and one as to a prior arrest of the defendant (335 U.S. at 472); it did not involve the multiple barrage of a dozen questions which the prosecutor was allowed to press here (pp. 10-11, supra). In *Michelson,* on direct examination the defendant's own counsel had already brought out the facts relating to the prior conviction (335 U.S. at 471 and 484), so

that the sole issue remaining related to the single question concerning the prior arrest; here petitioner Gosser had not even elected to testify at the time the dozen questions were allowed to be put to Msgr. Doyle. Furthermore, in *Michelson,* two of the reputation witnesses dated their acquaintance with the defendant as commencing 30 years before the trial, and the arrest had occurred 27 years before the trial (335 U.S. at 484); here (see pp. 10-11, supra), Msgr. Doyle had been acquainted with petitioner Gosser for 18 years, whereas some of the damaging and prejudicial questions put to him went back to the very remote period of more than 40 years earlier.

These distinctions show how far *Michelson* has been stretched by the courts below in the present case. If the fair scope of this Court's ruling in *Michelson* should nevertheless be deemed to cover this case, then this is an appropriate occasion for this Court to consider whether *Michelson* should be limited, modified or overruled. The case presents a compelling opportunity for this Court to assure that, in a federal courtroom, McCarthyism shall no longer be a weapon in the prosecutor's arsenal.

CONCLUSION

For each and all of the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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May 22, 1965

APPENDIX

APPENDIX A

Nos. 15415-6-7

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15415

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

RICHARD T. GOSSER, *Defendant-Appellant.*

No. 15416

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DONALD J. PINCIOTTI, *Defendant-Appellant.*

No. 15417

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

TED MAISON, *Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Ohio, Western Division.

Decided December 8, 1964.

Before: MILLER, O'SULLIVAN and PHILLIPS, Circuit Judges.

MILLER, Circuit Judge. The defendant-appellants, Richard T. Gosser, Donald J. Pinciotti, and Ted Maison, were indicted for conspiring during the period of October 5, 1962,

through November 12, 1962, to defraud the United States, in violation of Section 371, Title 18, United States Code. The indictment specifically charged that the defendants, together with Mrs. Patricia Niedomski, who was an employee of the United States, assigned to the Intelligence Division of the Internal Revenue Service, and who had access to the confidential files of said Intelligence Division, conspired that Mrs. Niedomski would make available to the defendants certain documents and transcriptions thereof, surreptitiously taken by her from the files of the Internal Revenue Service, pertaining to the investigation by said Service of the income tax returns of the defendant Gosser. Mrs. Niedomski was named as a conspirator but was not made a defendant. Following a trial of approximately 9 days, the jury returned a verdict of guilty against each defendant. Each defendant received a sentence of three years. These separate appeals followed, which have been heard together. In view of the strong reliance by the appellants Gosser and Pinciotti upon the defense of entrapment, we will state the evidence in some detail.

The Government's evidence showed the following. Patricia Niedomski was an employee in the Toledo, Ohio, office of the Internal Revenue Service, Intelligence Division. The defendant Ted Maison, who was married to her first cousin, was in the numbers business. The defendant Gosser was the senior International Vice President of the United Automobile Workers of America, AFL-CIO. The defendant Pinciotti was an employee of the International Union of the United Automobile Workers of America, and by assignment of the International Union was an Administrative Assistant to Gosser.

The Internal Revenue Service had some time prior to October 1962 instituted an inquiry and investigation of the income tax returns of Gosser for the years 1956, 1957, and 1958. These claims were subsequently settled without fraud penalties.

On October 19, 1962, an agent of the Toledo Treasury Intelligence Office noticed that Mrs. Niedomski was engaged in typing from reports which were not in her particular area of responsibility. From October 22 through November 1 Mrs. Niedomski was from time to time under surveillance by various government agents. On November 2 she was questioned by three agents and accused of giving Maison information from the files of the Intelligence Division. After extended questioning she finally admitted that she had been furnishing Maison with such information. Thereupon, the agents accompanied Mrs. Niedomski to her home, where they recovered two stenographic notebooks and six other documents, including copies of four sensitive case reports relating to a Treasury Intelligence investigation which had been conducted on Gosser for the years 1956, 1957, and 1958.

Mrs. Niedomski testified that during June or July 1962 she furnished Maison with a copy of some information taken by her without authority from the government files, the exact nature of which she did not remember; that about the end of September 1962 she gave Maison a copy of a memorandum relating to gambling at the Willys Overland plant in Toledo, which involved Maison's brother, which she had copied without authority; that on October 5, 1962, she met Maison at a bowling alley where he handed her an envelope containing $50.00, which was for the memorandum which she had given him regarding gambling activities at the Willys Overland plant; that at that time Maison asked her if she would like to make some extra money, and when she asked him in what way, Maison said "getting information on the Richard T. Gosser case"; that a little later in the evening when she was leaving, Maison began to converse with her about Gosser and Pinciotti and said that the papers he wanted her to get was "any information at all relating to the Richard T. Gosser case" and that Gosser "would be interested to know who the informant was"; that on October 12, 1962, she again saw Maison at the Elm

Recreation Bowling Alley, conversed with him and gave him some papers, the nature of which she did not recall; told him that she had typed a final report on the Richard T. Gosser case, that Maison asked her to get him a copy of it, and that she told him she would; that on the evening of October 19, 1962, she met Maison again and gave him a copy of a memorandum relating to Mr. Gross, which was in connection with the Richard T. Gosser case; that at that time Maison gave her $50.00 and asked her to get him a copy of the final report, and that she told him she wouldn't be able to; that she next saw Maison on October 26, 1962, at the Elm Recreation Bowling Alley, at which time she gave him a copy of the reports on the Richard T. Gosser case, that Maison slipped some currency in her purse, which amounted to $50.00; that on October 22 Maison called her and gave her some names to check on; that on October 29, 1962, Maison called her and gave her some additional names to check on, and told her "they were very well pleased with the information."

Two government agents also testified that they observed the meeting between Mrs. Niedomski and Maison on October 26 and saw her give certain papers to him while they were seated together at the bar. This was during the time Mrs. Niedomski was under surveillance beginning October 22. Mrs. Niedomski's testimony about these meetings with Maison was not contradicted by him, who did not take the witness stand. Mrs. Niedomski did not know either Gosser or Pinciotti.

Despite the mandatory provisions of Section 7214, Title 26, United States Code, requiring the discharge of a government employee who discloses such information, Mrs. Niedomski was not discharged. She returned to work on Monday, November 5, and attended to her regular duties except for an hour or so each day spent in conference with government inspectors. At these meetings plans were made for her to arrange a meeting with Maison for the follow-

ing Friday, November 9. On November 8 she phoned Maison, asked him if he was going to be bowling Friday night, and upon his saying that he was, she told him "I'll see you then."

At about 9:15 P.M. on the evening of November 9 Mrs. Niedomski came to the Federal Building parking lot where she met two government agents and two girls, who searched her person and made inventory of the contents of her purse. There was a wallet in it which contained $63.00. One of the government agents handed her some documents which she read and put in her purse. These were copies of the reports relating to the Richard Gosser case which had been found in her home. They had been dusted with fluorescent material, some of which was also inside the envelope in which the documents were placed. Mrs. Niedomski drove to the Elm Recreation Bowling Alley, followed by the agents. She watched Maison bowl for a while. After he finished bowling he came out to the bar and sat next to her, at which time she gave him the documents. He read them and put them in his pocket. She told him to please be careful and that she had to know what was going to happen to this information. Maison said he would call Pinciotti Sunday evening and tell him to meet him for a cup of coffee. She asked him what time they were going to meet. He told her Monday morning at 9:30 at the International Pancake House. Maison put $50.00 in her purse, which was later turned over to a government agent. Mrs. Niedomski left the bowling alley at 11:15 P.M. and returned to the Federal Building parking lot where her person and the contents of her purse were again searched and she made an affidavit as to the occurrences that evening. Her wallet contained $61.00 and there was $50.00 in loose money in her purse. No papers were found in her purse.

At approximately 9 A.M. on November 12 Maison entered the Pancake House in Toledo, where shortly thereafter he was joined at the table by Pinciotti. Maison handed

Pinciotti a large, white letter-size envelope which he withdrew from his pocket. Pinciotti withdrew the documents from the envelope and looked at them very carefully, turning the pages, for approximately ten minutes. He then placed them in his pocket and left the Pancake House. These acts were observed by two government agents who were seated nearby in the Pancake House. A government employee who had made the copies of the documents in question was seated approximately ten feet away and recognized the documents as the copies she had made by reason of the format of the papers and the fact that some of the columns under the forms filed were out of line.

After leaving the Pancake House Pinciotti went to the United Automobile Workers' Health and Retiree Center near the center of downtown Toledo where Gosser maintained his offices and where Pinciotti also had an office. A warrant was obtained for Pinciotti's arrest. At approximately 5:00 P.M. Federal officers entered a small office in the Retiree Center in which Gosser, Pinciotti and a man named Scott were seated. Pinciotti and Scott were seated on chairs near the door. Gosser was seated behind the desk. One of the officers stated to Pinciotti that he was being placed under arrest and he was taken into custody, although the officer at that time did not have the physical possession of the warrant. *Rule 4(c)(3), Rules of Criminal Procedure.* Pinciotti was searched but the documents were not found on his person. The officers then started to search the office, as a search incidental to the arrest, but were stopped by Gosser who said, "This is my room and you're not going to search it without a warrant." The arrest warrant and a search warrant arrived shortly thereafter and the office was searched. They found some papers on top of the desk, which were not the papers herein involved. They asked Gosser if he knew anything about the papers named in the search warrant and he said that he didn't have them and knew nothing about them. The envelope containing the documents was found very shortly thereafter in the middle

drawer of the desk. The documents were identified as the ones placed in Mrs. Niedomski's purse in the Federal Building parking lot on the previous Friday, November 9. Fluorescent material was in the envelope and traces of fluorescent glow were found on Pinciotti's hands. No such glow was found on Gosser's hands.

Pinciotti testified that he had known Maison only casually from some time in 1961, had met him only infrequently, and joined Maison at the Pancake House on the morning of November 12 by reason of a telephone call about 8:30 that morning from Maison suggesting that they get together at the Pancake House. He agreed, but upon joining Maison there he remembered that he had a meeting to attend and stayed only five or six minutes, long enough to have a cup of coffee. He stated that Maison handed him two envelopes, that he opened one of them, glanced through the papers for a second or two, noticed that they were a coin collection monthly report and a professional football schedule, and put them back in the envelope. He stated that he was a former professional football player, that collecting coins was one of his hobbies, that Maison was a dealer in coins, but that he had never been to Maison's coin shop or bought any coins from him. The coin collection data and football schedules were not produced or offered in evidence. He said that he did not look at the papers in the other envelope, and did not know what the envelope contained; that he put the two envelopes and other papers which he had on the automobile seat, took them to his office when he reached the Health and Retiree Center and placed them on the top of his desk as he left to attend a meeting. He was very busy with his work the rest of the day, which concluded with the meeting in his office with Gosser and Scott, at which he was arrested. He testified that the meeting with Scott had been arranged by him because Gosser wanted to talk to Scott about some whiskey Scott was donating to a coming bazaar. No explanation was given by Pinciotti, Gosser or

any witness about how the papers in question were transferred from the top of the desk to the drawer of the desk.

Pinciotti admitted on cross-examination that he was "somewhat aware" that there was an Internal Revenue Service investigation of the tax affairs of Gosser, although he didn't "know a heck of a lot," and after denying that he aided Gosser in any way in regard to the investigation, he admitted that he and some other persons went to Washington, but at no urging by Gosser, to talk to the President about the harassment of Gosser by the Internal Revenue Service; that the President's office referred him to Mr. Caplin; and that the purpose of his visit was that if an investigation was being made, it be completed and the harassment of Gosser be discontinued.

Gosser testified that he did not know either Mrs. Niedomski or Maison; that he did not ask anybody directly or indirectly to get any papers for him from the government files; that he did not touch or accept or receive any of the papers that Mrs. Niedomski testified about; that he was not aware that the papers in question were in the drawer of the desk; and that the entire case was "framed" by the Government to get him. He admitted on cross-examination that he was aware of an investigation that had been pending in the Intelligence Division of the Internal Revenue Service for some time prior to October 1962, his long-time association with Scott, and his presence with Pinciotti and Scott at the meeting where Pinciotti was arrested, and that he refused to let the government officers search the office until the search warrant arrived.

At the close of the Government's case the defendants moved for a directed verdict of acquittal. Gosser and Pinciotti contend that the motion should have been sustained on the ground of entrapment. The District Judge rejected this defense and instructed the jury, "I charge you as a matter of law that the facts of this case do not raise any issue of entrapment and therefore you are not

to consider it in your deliberations." Appellants contend (1) that the evidence was sufficient to require that the factual issue be submitted to the jury, and (2) that when the issue of entrapment is raised there are only two courses of action which can be followed, namely, (a) find entrapment as a matter of law and dismiss the indictment, or (b) instruct upon the issue of entrapment and let the jury decide the issue. This contention denies the right of the trial judge to rule as a matter of law, as the District Judge did in the present case, that the evidence is insufficient to constitute entrapment. This issue is briefed at length in separate briefs by these two appellants, with the citation of numerous authorities. We think that the contention is without merit for the following reasons.

The law with respect to entrapment is well stated in *Sorrells* v. *United States*, 287 U.S. 435. If the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion or inducement lured into the commission of a criminal act, entrapment exists and the Government is estopped by sound public policy from prosecution therefor. But, if the government officers merely afford opportunities or facilities for the commission of the offense, which originates in the mind of the accused, entrapment does not exist and the Government is not barred from prosecution. In keeping with the rule, the Supreme Court expressly recognized that "Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (Cases cited.) The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to *expose* the illicit traffic, . . . *the illegal conspiracy,* or other offenses, and thus to disclose the would-be violators of the law." (Emphasis added.) Subsequent decisions of the Supreme Court have applied the rule under varying circumstances, but have not changed it. *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v.

United States, 356 U.S. 386; *Lopez* v. *United States,* 373 U.S. 427, 434-437.

In our opinion, the undisputed facts establish, without question, that entrapment did not exist in the present case. The evidence showed without contradiction that Maison and Mrs. Niedomski were engaged in a conspiracy to obtain illegally copies of confidential documents in the Intelligence Division of the Internal Revenue Service long before the government agents knew about it or entered the case. There was no "manufacturing of crime by law enforcement officials and their agents," which, as pointed out in *Lopez* v. *United States, supra,* 373 U.S. 427, 434, "is far different from the permissible stratagems involved in the detection and prevention of crime." The fact that Mrs. Niedomski was used by the government agents to expose and prove the illegal conspiracy was a permissible artifice or stratagem to catch those who were engaged in the illegal conspiracy. Accordingly, there was no error on the part of the District Judge in overruling the motion for a directed verdict of acquittal based on the ground of entrapment.

This brings us to the second contention of appellant on this issue that, although the District Judge may have been justified in overruling the motion for a directed verdict and submitting the issue of entrapment to the jury, he did not have the right, regardless of how strong the evidence was on the issue, to refuse to submit the issue to the jury and to rule as a matter of law that entrapment did not exist and that the issue was not to be considered by the jury.

We recognize that there are cases relied upon by appellants that have held that the trial judge was correct, after overruling a motion for a directed verdict of acquittal on the ground of entrapment, in submitting the issue to a jury. The factual issues in those cases made the question of entrapment one for the jury. But those cases do not hold that the trial judge may not rule as a matter of law, if the evidence is uncontradicted and such as to sustain such

a ruling, that the issue of entrapment does not exist and is not to be considered by the jury. Nor is the ruling in *Sherman* v. *United States, supra,* 356 U.S. 369, also relied upon by appellants, to that effect. The Court held in that case that it was error to submit the issue to the jury because entrapment was shown by the evidence as a matter of law. The same situation was before this Court in *Morales* v. *United States,* 260 F(2) 939, C.A. 6th, also relied upon by appellants, in which we held that entrapment was established as a matter of law and the issue should not have been submitted to a jury. Nor do we think that the dicta relied upon by appellants in those two cases should be given the construction urged upon us by appellants.

We also recognize that in *Sorrells* v. *United States, supra,* 287 U.S. 435, the Supreme Court reversed the ruling of the District Judge that there was no entrapment as a matter of law and in refusing to submit the issue to the jury, as the District Judge ruled in this case. But the ruling in that case was expressly based upon the ground that the evidence was insufficient to support the ruling (see p. 452) and not upon the ground that the District Judge was not empowered to make such a ruling. It might well be considered an implied recognition of the power to make the ruling.

In support of the ruling of the District Judge there is the well-settled rule in criminal cases that if there is no evidence to support a particular defense, the trial judge is justified in refusing to submit such defense to the jury. *Passantino* v. *United States,* 32 F(2) 116, C.A. 8th; *Percifield* v. *United States,* 241 F(2) 225, 229, C.A. 9th. Defendant's theory of the case must have support in the evidence in order to require an instruction as to it. *Marson* v. *United States,* 203 F(2) 904, 912, C.A. 6th. We think that this rule is as applicable to the defense of entrapment as it is to any other defense. It has been so held. *Shaw* v.

United States, 151 F(2) 967, 969, C.A. 6th; *United States* v. *Di Donna,* 276 F(2) 956, C.A. 2nd. The Supreme Court has also indicated its approval of the right of the District Judge to refuse to instruct the jury on the defense of entrapment if the evidence fails to support such a defense. *Lopez* v. *United States, supra,* 373 U.S. 427, 436. We find no error on the part of the District Judge in ruling as a matter of law that the defense of entrapment was not an issue in this case.

The appellants also contend in support of their motion for a directed verdict of acquittal, made at the close of the Government's case, that the evidence was insufficient to support a verdict of guilty. That ground was also rejected by the District Judge in overruling the motions. Thereafter, the defendants offered evidence in their own behalf. At the conclusion of all the evidence the motions for judgment of acquittal were not renewed. On this appeal the appellants contend that this ruling of the District Judge was reversible error.

It is the settled rule that if a defendant at the close of the Government's case moves for judgment of acquittal on the ground that the evidence is insufficient to support a verdict of guilty, and after the motion is overruled, introduces evidence in his own behalf, he waives his objections to the denial of his motion for judgment of acquittal on that ground. *United States* v. *Calderon,* 348 U.S. 160, Note 1, page 164; *Gendron* v. *United States,* 295 F(2) 897, 900, C.A. 8th; *Lupo* v. *United States,* 322 F(2) 569, 572-573, C.A. 9th; *Benchwick* v. *United States,* 297 F(2) 330, 335, C.A. 9th; *Jasso* v. *United States,* 290 F(2) 671, 673, C.A. 5th, cert. denied, 368 U.S. 858; *Corbin* v. *United States,* 253 F(2) 646, 647, C.A. 10th; *United States* v. *Aman,* 210 F(2) 344, 345-346, C.A. 7th; *Clark* v. *United States,* 293 F(2) 445, 448, C.A. 5th.

We recognize that under Rule 52(b), Rules of Criminal Procedure, plain errors affecting substantial rights may be

noticed even though they have not been brought to the attention of the Court. *United States* v. *Cooper,* 321 F(2) 456, 457, C.A. 6th. The Court in *Corbin* v. *United States, supra,* 253 F(2) 646, C.A. 10th, said at page 648 in recognizing this exception, "This is an exceptional power to be sparingly used." See also: *Armstrong* v. *United States,* 65 F(2) 853, 856, C.A. 10th. In keeping with that rule we have considered appellants' contention and have concluded that it should be denied. The Government's evidence shows very strongly the existence of the conspiracy on the part of Mrs. Niedomski, Maison and Pinciotti. The income tax investigation of Gosser, the fact that the information taken from the government files and turned over to Maison and then to Pinciotti dealt with this investigation, the nature of the relationship between Pinciotti and Gosser, the fact that Pinciotti went to Washington on Gosser's behalf with respect to this investigation, the presence of the papers in the drawer of the desk at which Gosser was seated, and Gosser's statement that the office in which the desk was located was his office, justify the reasonable inference that Pinciotti was procuring this information for Gosser, and tend strongly to link Gosser with this conspiracy. It would be an unreasonable inference to infer that Pinciotti wanted this information for himself rather than for Gosser or that he was doing what he did without authorization by Gosser. This Court said in *Poliafico* v. *United States,* 237 F(2) 97, at page 104, cert. denied, 352 U.S. 1025, rehearing denied, 353 U.S. 931, "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it." See also: *Meyers* v. *United States,* 94 F(2) 433, 444, C.A. 6th, cert. denied, 304 U.S. 583, rehearing denied, 305 U.S. 670; *United States* v. *Cohen,* 197 F(2) 26, C.A. 3rd; *Nye & Nissen* v. *United States,* 168 F(2) 846, 852, C.A. 9th, affirmed, 336 U.S. 613; *Phelps* v. *United States,* 160 F(2) 858, 867, C.A. 8th, cert. denied sub nom. *Peters* v. *United States,* 334 U.S. 860; *Isaacs* v. *United States,* 301 F(2) 706, 724-725, C.A. 8th, cert. denied, 371 U.S. 818.

The appellant Gosser moved to suppress the evidence obtained by the search warrant on the grounds that (1) the affidavit upon which it was based did not establish probable cause, (2) the affidavit was unreliable because based upon hearsay, and (3) the search was improperly conducted during the nighttime. The motion was overruled. Appellant contends that this was prejudicial error.

Probable cause for the issuance of a search warrant exists where the circumstances before the officer are such as to cause a man of reasonable prudence to believe that an offense is being committed. The Commissioner must exercise his own judgment as to whether the facts in the affidavit constitute probable cause and his determination is conclusive, unless his judgment is arbitrarily exercised. *Evans* v. *United States,* 242 F(2) 534, 536, C.A. 6th, cert. denied, 353 U.S. 976; *Merritt* v. *United States,* 249 F(2) 19, 21, C.A. 6th. As this Court said in *United States* v. *Eisner,* 297 F(2) 595, 597, cert. denied, 369 U.S. 859, "In determining what is probable cause, the Commissioner is not called upon to determine whether the offense charged has in fact been committed. He is concerned only with the question whether there is reasonable grounds to believe at the time of the affidavit that the law was being violated on the premises to be searched." The facts stated in an affidavit may be sufficient to establish probable cause, although they may not be sufficient to convince the Commissioner beyond a reasonable doubt that the defendant has committed an offense. In our opinion, there was no abuse of discretion on the part of the District Judge in holding that probable cause existed under the affidavit of Government Agent Albert Follin and in issuing the search warrant based thereupon.

Appellants' connection that the issuance of the search warrant was invalid because it was based upon hearsay statements contained in the affidavit is answered by the rulings of the Supreme Court in *Jones* v. *United States,*

362 U.S. 257, and *Rugendorf* v. *United States,* 376 U.S. 528, 533, rehearing denied, 377 U.S. 940. The Court ruled in those cases that hearsay alone does not render an affidavit insufficient so long as there is a substantial basis for crediting the hearsay. The present case comes within that rule.

The evidence shows that the search under the warrant was made 9 minutes after sunset pursuant to a daytime search warrant. Appellant contends that this was contrary to the provisions of Rule 41(c), Rules of Criminal Procedure, which require that the warrant be served in the daytime. This Court held in *United States* v. *Woodson,* 303 F(2) 49, 51-52, cert. denied, 373 U.S. 941, "Daytime does not in law or by common understanding, begin at sunrise or end at sunset, but includes dawn at the one end and twilight at the other. The practical test given by the ancient authorities is the existence of sufficient light from the sun to recognize a man's features." See also: *Sasser* v. *United States,* 227 F(2) 358, 359, C.A. 5th; *Atlanta Enterprises* v. *Crawford,* 22 F(2) 834, 837, N.D. Ga.; *United States* v. *Liebrich,* 55 F(2) 341, 343, M.D. Pa.

Accordingly, we find no merit in appellant's contention that the District Judge erred in overruling the motion to suppress.

The Government, in its cross-examination of a character witness, Msgr. Doyle, introduced by Gosser, asked the witness these questions, "In discussing Mr. Gosser's reputation with the people with whom you have discussed his reputation, have you ever discussed the fact of his association with one Neufio Scott, who is a convicted felon and a gambler?" Also, "In discussing the fact of Mr. Gosser's reputation with people with whom you have discussed his reputation, have you heard that Mr. Gosser had been convicted, or rather pled guilty to a charge of robbery on the Dixie Highway in 1921?" Gosser's objections to the questions were overruled. His following motion for a mistrial

was also overruled. The same question was presented by the cross-examination of another character witness for the defendant Gosser.

In considering the propriety of these questions we must keep in mind that they were asked in the cross-examination of a character witness for the defendant, not of the defendant himself. With respect to such witnesses, the rule is much broader than is the case in the cross-examination of a defendant. Proceeding on the assumption that the questions would have been improper if asked of the defendant, whose credibility as a witness can not be attacked by evidence of prior arrests without convictions or association with convicted felons or gamblers, *Henderson* v. *United States,* 202 F(2) 400, 405-406, C.A. 6th, cert. denied, 349 U.S. 920, rehearing denied, 349 U.S. 969; *United States* v. *Pennix,* 313 F(2) 524, C.A. 4th; the rule is not so limited in the cross-examination of a character witness. Questions of the kind here asked are relevant and material to test the opinion of the witness that the reputation of the defendant was good. In the present case the Government offered, out of the jury's presence, to prove all of the assumptions in its cross-examination. The District Judge also gave cautionary and limiting instructions to the jury several times with respect to the way this testimony could be considered. We find no prejudicial error in the rulings. *Michelson* v. *United States,* 335 U.S. 469, 479, 482; *United States* v. *Giddins,* 273 F(2) 843, 845, C.A. 2nd, cert. denied, 362 U.S. 971; *Horton* v. *United States,* 256 F(2) 138, 141, C.A. 6th; *Krogmann* v. *United States,* 225 F(2) 220, 226, C.A. 6th.

Agent Kreitner testified for the Government about what happened at the time of the arrest of Pinciotti. He was asked, "Did you have any conversation with Mr. Gosser about—after you displayed the credentials?" Upon answering that he did, he was asked what the defendant said. He answered, "He said he objected to the police state type

of the activities of our coming up to the union hall, and he said that he—he mentioned that he had been to the Reform School, during the conversation with him he said he had spent some time—." At that point he was interrupted by government counsel, asking, "Well, just tell us what he said in regard to the—if anything, in regard to a search." Gosser's motion for a mistrial on the ground that the testimony about Gosser having been in the Reform School was improper and prejudicial was overruled. Appellant contends that the ruling was prejudicial error, in that Gosser, at that time, had not testified in his own behalf, and, in any event, evidence attacking his credibility as a witness was restricted to proof of prior conviction of a felony or of an offense involving moral turpitude. *Henderson* v. *United States, supra,* 202 F(2) 400, 405-406, C.A. 6th, cert. denied, 349 U.S. 920, rehearing denied, 349 U.S. 969.

The District Judge conferred with counsel for the parties, out of the presence of the jury. He expressed the opinion that the statement of the witness was not a planned affair, but came as a surprise to government counsel, who immediately attempted to divert the mind of the witness to something different. He was, however, of the opinion that the statement of the witness was improper. He instructed the jury that whether Gosser made the remark or whether he had been in a Reform School was of absolutely no concern to the jury in the hearing and determination of the case, and that the jurors should place no value upon the statement, but should forget it and eradicate it from their minds.

Gosser later testified in his own behalf and stated on cross-examination that he had known Tony Scott since he was about fifteen years old, when he was in Reform School with him, and that he had pleaded guilty to highway robbery and had received a sentence of thirty months. The jury at that time was instructed that the evidence

given concerning a prior incarceration was to be considered as going only to the question of the credibility of the witness.

We are of the opinion that under the circumstances hereinabove set out, there was no prejudicial error in refusing to grant appellant's motion for a mistrial. *Rule 52(a), Rules of Criminal Procedure; White* v. *United States,* 279 F(2) 740, 749, C.A. 4th, cert. denied, 364 U.S. 850; *Kreinbring* v. *United States,* 216 F(2) 671, 673, C.A. 8th; *Weeks* v. *United States,* 313 F(2) 688, 694, C.A. 10th, cert. denied, 373 U.S. 922; *Jones* v. *United States,* 282 F(2) 745, 747, C.A. 4th, cert. denied, 365 U.S. 842.

At the conclusion of the cross-examination of Mrs. Niedomski, counsel for Gosser asked that the Government furnish him "copies of all statements that she has testified about." The Government gave to him two affidavits of the witness and transcriptions of seven interviews with her, but declined to turn over to him so-called "witness sheets," which had been prepared by Government counsel for use in the trial. The District Judge held a hearing out of the jury's presence to ascertain what the "witness sheets" contained and to determine whether they constituted a "statement" of the witness which related to the subject matter as to which the witness had testified, and which under the Jencks Act would have to be produced for the use of the defendant. *Section 3500, Title 18, United States Code.* The Government attorney stated that they were his notes of what he expected the witness to testify to, prepared and dictated by him, that they did not contain a substantially verbatim recital of what the witness said, and was his work sheet in preparation for trial. He offered to take the stand if necessary. The District Judge held that the "witness sheets" were the attorney's work sheets in preparation for trial, that they did not constitute a "statement" of the witness within the meaning of the Jencks Act, and did not have to be produced for the use of the defendant. The ruling is challenged on this appeal.

The procedure used by the District Judge was in accordance with the ruling in *Campbell* v. *United States,* 365 U.S. 85, and *Campbell* v. *United States,* 373 U.S. 487, wherein the Court held that the question was one of fact, the determination of which by the District Judge would not be disturbed unless clearly erroneous. The "witness sheets" were not prepared or signed by the witness. Nor were they at any time approved by the witness, which is the distinguishing fact between this case and the Campbell case. In our opinion, the finding of the District Judge is not clearly erroneous and must be accepted on this review. Compare: *Hickman* v. *Taylor,* 329 U.S. 495, 511.

Other issues have been raised by the appellants, which have also had our consideration. We believe it is sufficient to say that we find them to be without merit without unduly lengthening this opinion by a detailed discussion of them.

The judgments are affirmed.

APPENDIX B

Constitutional, Statutory and Rules Provisions Involved

Due Process Clause, Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Trial By Jury Clause, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

Jencks Act, 18 U.S.C. § 3500

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony

of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a sub-

stantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rule 26, Federal Rules of Criminal Procedure

Rule 26. Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.